PUGANESWARAN GANESAN & ORS v. PP & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
NALLINI PATHMANATHAN FCJ
VERNON ONG LAM KIAT FCJ
ABDUL RAHMAN SEBLI FCJ
[CRIMINAL APPEALS NO: 05(M)-241-10-2018(B); 05(M)-242-10-2018(B) & 05(L)-243-10-2018(B)]
28 AUGUST 2020

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Witnesses for prosecution – Whether testimonies of prosecution witnesses ought to have been rejected as they were accomplices – Whether there was corroboration of prosecution witnesses' evidence to link accused persons with murder of deceased – Whether physical presence necessary to constitute participation – Whether sufficient for accused to have done act with nexus to offence – Whether murder committed in furtherance of common intention of accused persons – Whether there was miscarriage of justice*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Murder – Witnesses for prosecution – Whether testimonies of prosecution witnesses ought to have been rejected as they were accomplices – Whether there was corroboration of prosecution witnesses' evidence to link accused persons with murder of deceased – Whether physical presence necessary to constitute participation – Whether sufficient for accused to have done act with nexus to offence – Whether murder committed in furtherance of common intention of accused persons – Whether there was miscarriage of justice*

EVIDENCE: *Corroboration – Accomplice – Evidence of accomplice – Whether accomplice competent witnesses – Whether testimonies of accomplices ought to have been rejected – Whether there was corroboration of accomplices' evidence to link accused persons with murder of deceased*

In the High Court, the appellants were charged under s. 302 of the Penal Code and jointly tried for the murder of the deceased. The deceased was the husband of the second appellant, and they both lived next door to the first appellant. The third appellant had introduced the prosecution witnesses, SP3, SP4 and SP5 to the first and second appellants. These three witnesses were the lynchpin of the prosecution case. The evidence of SP3, SP4 and SP5 were that on the evening of 15 February 2012 *ie*, the day before the murder, they were brought by the third appellant to the first appellant's house. The second appellant was present on this occasion. It was at this meeting that the first appellant told SP3, SP4 and SP5 that he wanted the deceased to be killed and promised SP3, SP4 and SP5 RM5,000 each to do the job, which was to be paid using the deceased's EPF savings. At about 2am on 16 February 2012, the first appellant received a missed call from the second appellant, which was the latter's signal to the first appellant that the deceased had

returned home from work and had gone to sleep. The first appellant then instructed the third appellant, SP3, SP4 and SP5 to proceed next door to carry out his nefarious plan. As pre-arranged, the second appellant opened the front door of the house. But before they could take the next step, SP4 became scared and ran out of the house, followed by SP3 and SP5 and the third appellant and they returned to the first appellant's house. At the first appellant's house, the first and third appellants scolded SP3, SP4 and SP5 and threatened to kill them if they refused to do what they were told. After about an hour, SP3, SP4 and SP5 were asked again to carry out the original plan. The first appellant performed a 'puja' prayer and rubbed a parang (exh. 9) with prayer ash and handed it to SP4 and told the witnesses not to worry as the parang had been blessed. At about 2.45am, the second appellant opened the front door of the deceased's house and she passed a pillow to SP5. As pre-arranged, SP5 then covered the deceased's face with the said pillow while SP3 held the deceased's legs. At the same time, the third appellant stabbed the deceased with the knife he was carrying. According to SP5, he saw the third appellant stabbing the deceased twice while SP4, who was carrying the parang, only stood behind the third appellant. The stabbing woke the deceased up and he groaned in pain. The third appellant, SP3, SP4 and SP5 then ran through the same door they had entered earlier. SP4 threw the parang on the floor in the living room of the deceased's house. Despite being fatally injured, the deceased managed to chase after his assailants but collapsed and died in the corridor in front of the appellant's house. The deceased's body was brought to the hospital and a post mortem was conducted on him. The cause of death was due to 'haemorrhagic shock due to multiple penetrating stab wounds.' At the conclusion of the trial, the appellants were found guilty as charged. The first and second appellants were sentenced to death whilst the third appellant was ordered to be detained at the pleasure of DYMM Sultan of Selangor pursuant to s. 97(2)(b) of the Child Act 2001 as he was underaged at the time of the offence. Their appeals to the Court of Appeal were dismissed, hence the present appeals. The main plank of the appellants' argument was that the testimonies of SP3, SP4 and SP5 ought to have been rejected by the trial judge as they were accomplices and there was no independent corroboration of their evidence.

Held (dismissing appeals)
Per Abdul Rahman Sebli FCJ delivering the judgment of the court:

(1) An accused person may be convicted even on the uncorroborated evidence of an accomplice and it is totally irrelevant that the accomplice is not charged together with the others who committed the same crime. The object of corroboration no doubt is to satisfy the court that the witnesses are telling the truth and that it is reasonably safe to act on their evidence. It is not necessary that the corroboration should be of the actual commission of the crime, for then there would be independent

evidence of the commission of the crime. It would be enough corroboration if there is independent evidence of relevant circumstances connecting the accused with the crime. (paras 61 & 66)

(2) If this court were to accede to the appellants' argument that SP3, SP4 and SP5 should have been charged together with the appellants for the murder of the deceased instead of being made prosecution witnesses, it would render illusory the Public Prosecutor's constitutional power to decide who among the perpetrators of the crime should be charged and who to be made prosecution witnesses. The implication is to render s. 133 of the Evidence Act 1950 completely redundant and denuded of all meaning, which goes against an established canon of statutory interpretation that the Legislature does not legislate in vain. This court was therefore constrained to reject the appellants' argument. (para 67)

(3) The testimonies of the three accomplices were corroborated not just by one material fact that pointed to the guilt of the appellants but by at least eight strands of neutral evidence, thus making it safe for the trial judge to have relied on their evidence. The independent evidence that afforded corroboration to the evidence of SP3, SP4 and SP5 were (i) independent and unchallenged forensic evidence corroborated SP5's evidence that the deceased was stabbed twice by the third appellant; (ii) there was blood splattered on the floor right next to the deceased's bed, which corroborated the accomplices' evidence that he was stabbed in his bedroom while he was sleeping; (iii) there was blood on the floor in the living room corroborating the accomplices' evidence that the deceased came out of the room after being stabbed; (iv) the deceased's body was found in the corridor in front of the first appellant's house, located next to the deceased's house which corroborated the accomplices' testimony that the deceased chased after them before he collapsed and died; (v) the parang was found on the floor in the living room of the deceased's house which corroborated SP4's evidence that he threw the parang on the floor in the living room as he fled the scene after the murder; (vi) the existence of the altar in the first appellant's house corroborated the accomplices' evidence that the first appellant had performed 'puja' prayer to bless the parang; (vii) no trace of blood was found on the parang, corroborating SP4's evidence that he did not use the parang to slash the deceased; and (viii) the assailants had entered the deceased's house twice with ease at unearthly hours, which was a strong circumstantial evidence to corroborate the accomplices' testimony that the second appellant had, as pre-arranged, opened the main door to let them in to carry out the murder. Thus, this court could not accede to the appellants' contention that there was no corroboration of the accomplices' evidence to link them with the murder of the deceased. The trial judge was correct to accept SP3, SP4 and SP5 as witnesses of truth on all material particulars,

whose evidence taken together and in its entirety showed that the murder of the deceased by the third appellant was in furtherance of the common intention of all three appellants. (paras 72-74)

(4) The allegation that SP3, SP4 and SP5 had given evidence on behalf of the prosecution 'in exchange for want of prosecution' was without basis. It was not even put to SP3, SP4 and SP5 that they had been promised with immunity from the prosecution in return for implicating the appellants in the murder of the deceased. By failing to put the allegation to SP3, SP4 and SP5 in cross-examination, these witnesses had been deprived of the chance to defend their positions either by confirming the allegation or denying it while they were still in the witness box and while still under oath. In any event, it was entirely for the Public Prosecutor to decide whom to call as witnesses to ensure that justice is done. The allegation was therefore wholly unjustified and had no bearing on the correctness of the decision of the High Court to convict the appellants. (paras 77-79)

(5) Physical presence is not necessary to constitute participation in every case. It is sufficient for the accused to have done an act with some nexus to the offence. This answered the first appellant's argument that he could not be held liable for the murder of the deceased as he was not present at the scene of the crime and did not take part in the stabbing of the deceased. By finding SP3, SP4 and SP5 to be truthful witnesses, clearly the trial judge had accepted as a fact that the first appellant was the mastermind behind the murder of the deceased although he was not physically present when the deceased was stabbed to death by the third appellant. (paras 89 & 90)

(6) The High Court and the Court of Appeal had made concurrent findings of fact, in particular, a finding that the murder was committed in furtherance of the common intention of all three appellants. It had not been shown that the concurrent findings of fact by the courts below were unsupported by evidence, direct or circumstantial. The Court of Appeal was right in affirming the decision of the High Court to find each of the appellants guilty of the offence charged. There had been sufficient judicial appreciation of the evidence by the trial judge and she had not misdirected herself either on the facts or on the law. The question of miscarriage of justice did not arise at all. (paras 91, 93, 95 & 96)

Bahasa Melayu *Headnotes*

Di Mahkamah Tinggi, perayu-perayu dituduh bawah s. 302 Kanun Keseksaan dan dibicara bersama-sama untuk pembunuhan si mati. Si mati adalah suami kepada perayu kedua, dan mereka tinggal bersebelahan dengan perayu pertama. Perayu ketiga telah memperkenalkan saksi-saksi

pendakwaan, SP3, SP4 dan SP5 kepada perayu pertama dan kedua. Ketiga-tiga saksi ini adalah penghubung kes pendakwaan. Keterangan SP3, SP4 dan SP5 adalah bahawa pada petang 15 Februari 2012, sehari sebelum hari pembunuhan, mereka telah dibawa oleh perayu ketiga ke rumah perayu pertama. Perayu kedua hadir pada masa itu. Semasa pertemuan ini, perayu pertama telah memberitahu SP3, SP4 dan SP5 bahawa dia ingin si mati dibunuh dan menjanjikan RM5,000 setiap seorang pada SP3, SP4 dan SP5 untuk melakukannya, yang akan dibayar menggunakan simpanan KWSP si mati. Pada pukul 2 pagi 16 Februari 2012, perayu pertama menerima satu panggilan tidak dijawab daripada perayu kedua, iaitu satu isyarat kepada perayu pertama bahawa si mati telah pulang dari kerja dan telah tidur. Perayu pertama kemudiannya mengarahkan perayu ketiga, SP3, SP4 dan SP5 untuk ke rumah sebelah untuk menjalankan rancangan jahatnya. Seperti yang telah diatur, perayu kedua membuka pintu depan rumahnya. Tetapi sebelum mereka mengambil langkah seterusnya, SP4 menjadi takut dan lari keluar dari rumah itu, diikuti SP3 dan SP5 dan perayu ketiga dan mereka kembali ke rumah perayu pertama. Di rumah perayu pertama, perayu pertama dan perayu ketiga telah memarahi SP3, SP4 dan SP5 dan mengugut akan membunuh mereka jika mereka enggan melakukan apa yang telah diarahkan. Selepas sejam, SP3, SP4 dan SP5 diminta lagi sekali untuk melaksanakan rancangan asal. Perayu pertama menunaikan upacara 'puja' dan mengusap parang (eks. 9) dengan abu upacara dan memberikannya kepada SP4 dan memberitahu saksi-saksi bahawa mereka tidak perlu risau kerana parang itu telah diberkati. Pada pukul 2.45 pagi, perayu kedua telah membuka pintu depan rumah si mati dan memberikan bantal kepada SP5. Seperti yang dirancangkan sebelum ini, SP5 kemudiannya menutup wajah si mati dengan bantal tersebut sementara SP3 memegang kaki si mati. Pada waktu yang sama, perayu ketiga telah menikam si mati dengan pisau yang telah dibawanya. Menurut SP5, dia melihat perayu ketiga menikam si mati dua kali sementara SP4, yang memegang parang, hanya berdiri di belakang perayu ketiga. Tikaman itu telah membangunkan si mati dan dia mengerang kesakitan. Perayu ketiga, SP3, SP4 dan SP5 kemudiannya melarikan diri melalui pintu yang sama mereka masuki sebelum ini. SP4 telah membuang parang ke lantai ruang tamu rumah si mati. Walaupun cedera parah, si mati mengejar penyerang-penyerangnya tetapi dia rebah dan meninggal dunia di koridor di hadapan rumah perayu. Mayat si mati dibawa ke hospital dan satu bedah siasat dilakukan ke atasnya. Punca kematian dijangkakan 'kejutan hemoragik akibat luka tikaman yang banyak menembusi'. Pada akhir perbicaraan, perayu-perayu didapati bersalah. Perayu pertama dan perayu kedua dihukum mati sementara perayu ketiga diperintahkan untuk ditahan di bawah perkenan DYMM Sultan Selangor bawah s. 97(2)(b) Akta Kanak-Kanak 2001 kerana dia di bawah umur pada masa kesalahan. Rayuan-rayuan mereka ke Mahkamah Rayuan ditolak, oleh itu, rayuan-rayuan ini. Isu utama hujahan perayu-perayu adalah bahawa kesaksian-kesaksian SP3, SP4 dan SP5 harus ditolak oleh hakim bicara kerana mereka adalah rakan-rakan subahat dan tiada pembuktian tanpa sokongan bebas keterangan mereka.

Diputuskan (menolak rayuan-rayuan)
Oleh Abdul Rahman Sebli HMP menyampaikan penghakiman mahkamah:

(1) Tertuduh boleh disabitkan kesalahan walaupun atas keterangan yang tidak disokong rakan subahat, dan tidak relevan langsung bahawa rakan subahat tidak dituduh bersama-sama dengan mereka yang telah melakukan jenayah yang sama. Objek sokongan adalah untuk memuaskan mahkamah bahawa saksi-saksi bercakap benar dan adalah selamat untuk bertindak atas keterangan mereka. Tidak perlu untuk sokongan berkenaan pelakuan jenayah sebenar, untuk itu akan ada keterangan bebas mengenai pelakuan jenayah itu. Sokongan cukup memadai jika terdapat keterangan bebas keadaan-keadaan relevan yang menghubungkan tertuduh dengan jenayah.

(2) Jika mahkamah akur kepada hujahan perayu-perayu bahawa SP3, SP4 dan SP5 sepatutnya dituduh bersama-sama dengan perayu-perayu untuk pembunuhan si mati dan bukan dijadikan saksi-saksi pendakwaan, itu akan menjadikan kuasa perlembagaan Pendakwa Raya untuk memutuskan siapa antara pelaku-pelaku jenayah yang patut dituduh dan siapa untuk dijadikan saksi-saksi pendakwaan sebagai satu khayalan. Implikasinya membuat s. 133 Akta Keterangan 1950 berlebihan dan menafikan semua maksud, yang bertentangan dengan prinsip pentafsiran statutori bahawa badan perundangan tidak membuat perundangan secara sia-sia. Mahkamah ini, oleh itu, menolak hujahan perayu-perayu.

(3) Kesaksian-kesaksian ketiga-tiga rakan subahat tidak hanya disokong oleh satu fakta material yang menunjukkan perayu-perayu bersalah tetapi oleh sekurang-kurangnya lapan helai keterangan neutral, oleh itu membuatkannya selamat untuk hakim bicara bergantung pada keterangan mereka. Keterangan bebas yang memberi sokongan kepada keterangan SP3, SP4 dan SP5 adalah (i) keterangan forensik bebas dan tidak dicabar menyokong keterangan SP5 bahawa si mati ditikam dua kali oleh perayu ketiga; (ii) terdapat percikan darah di atas lantai di tepi katil si mati, yang menyokong keterangan rakan-rakan subahat bahawa dia telah ditikam di dalam bilik tidurnya semasa si mati sedang tidur; (iii) terdapat darah atas lantai di ruang tamu yang menyokong keterangan rakan-rakan subahat bahawa si mati telah keluar dari bilik selepas ditikam; (iv) mayat si mati ditemui di koridor depan rumah perayu pertama, yang terletak di sebelah rumah si mati yang menyokong kesaksian rakan-rakan subahat bahawa si mati telah mengejar mereka sebelum si mati rebah dan meninggal dunia; (v) parang ditemui atas lantai di ruang tamu rumah si mati yang menyokong keterangan SP4 bahawa dia telah baling parang ke atas lantai di ruang tamu tersebut dan melarikan diri dari tempat kejadian selepas pembunuhan; (vi) kewujudan mazbah dalam rumah perayu pertama menyokong

keterangan rakan-rakan subahat bahawa perayu pertama telah menunaikan upacara puja untuk memberi berkat pada parang; (vii) tiada kesan darah ditemui pada parang menyokong keterangan SP4 bahawa dia tidak menggunakan parang itu untuk mengelar si mati; dan (viii) penyerang-penyerang telah memasuki rumah si mati dua kali dengan senang pada waktu tengah malam, dan ini adalah keterangan keadaan yang kuat untuk menyokong kesaksian rakan-rakan subahat bahawa perayu kedua telah, seperti yang dirancang sebelum ini, membuka pintu depan untuk mereka masuk untuk melakukan pembunuhan itu. Oleh itu, mahkamah ini tidak boleh akur pada hujahan perayu-perayu bahawa tiada sokongan keterangan rakan-rakan subahat untuk menghubungkan mereka dengan pembunuhan si mati. Hakim bicara betul apabila menerima SP3, SP4 dan SP5 sebagai saksi-saksi kebenaran berkenaan segala maklumat penting, yang keterangannya diambil bersama-sama dan secara keseluruhannya menunjukkan pembunuhan si mati oleh perayu ketiga adalah dalam lanjutan niat bersama ketiga-tiga perayu.

(4) Dakwaan bahawa SP3, SP4 dan SP5 telah memberikan keterangan bagi pihak pendakwaan 'in exchange for want of prosecution' adalah tanpa asas. Malah tidak dikemukakan pada SP3, SP4 dan SP5 bahawa mereka telah dijanjikan dengan imuniti daripada pendakwaan sebagai balasan mengaitkan perayu-perayu dalam pembunuhan si mati. Dengan kegagalan membuat dakwaan sedemikian kepada SP3, SP4 dan SP5 semasa pemeriksaan balas, saksi-saksi ini telah dilucutkan peluang untuk mempertahankan kedudukan mereka sama ada dengan mengesahkan dakwaan atau menafikannya semasa mereka masih berada dalam kandang saksi dan sementara masih dalam keadaan bersumpah. Dalam apa jua keadaan, adalah untuk Pendakwa Raya memutuskan siapa yang ingin dipanggil sebagai saksi-saksi untuk memastikan keadilan dilaksanakan. Dakwaan, oleh itu tidak mempunyai justifikasi dan tidak mempengaruhi keputusan betul Mahkamah Tinggi untuk mensabit perayu-perayu.

(5) Kehadiran secara fizikal tidak perlu untuk menetapkan penyertaan dalam setiap kes. Adalah mencukupi untuk tertuduh melakukan satu tindakan yang mempunyai nexus kepada kesalahan. Ini menjawab hujahan perayu pertama bahawa dia tidak bertanggungjawab untuk pembunuhan si mati kerana dia tidak hadir di tempat kejadian dan tidak mengambil bahagian dalam penikaman si mati. Dengan mendapati SP3, SP4 dan SP5 sebagai saksi-saksi kebenaran, jelas sekali hakim bicara telah menerima sebagai fakta bahawa perayu pertama adalah dalang dalam pembunuhan si mati walaupun dia tidak hadir secara fizikal apabila si mati ditikam sehingga mati oleh perayu ketiga.

(6) Mahkamah Tinggi dan Mahkamah Rayuan telah membuat penemuan serentak fakta, khususnya dapatan bahawa pembunuhan dilakukan dalam lanjutan niat bersama ketiga-tiga perayu. Tidak ditunjukkan bahawa penemuan serentak fakta oleh mahkamah-mahkamah bawahan tidak disokong oleh keterangan, secara langsung atau keadaan. Mahkamah Rayuan betul dalam mengesahkan keputusan Mahkamah Tinggi yang mendapati setiap perayu bersalah atas kesalahan yang dipertuduh. Terdapat pertimbangan kehakiman yang mencukupi berkenaan keterangan oleh hakim bicara dan beliau tidak tersalah arah sama ada atas fakta atau undang-undang. Persoalan salah laksana keadilan tidak timbul sama sekali.

Case(s) referred to:

AEG Carapiet v. AY Derderian AIR 1961 Cal 359 ***(refd)***
Antonio Dias Caldeira v. Frederick Augustus Gray [1934] 1 LNS 5 PC ***(refd)***
Attan Abdul Gani v. PP [1969] 1 LNS 12 HC ***(refd)***
Barendra Kumar Ghose v. Emperor AIR 1925 PC 1 ***(refd)***
Browne v. Dunn (1893) 6 R 67 ***(refd)***
Chiu Nang Hong v. PP [1964] 1 LNS 24 PC ***(refd)***
Chong Chee Liong v. PP [2008] 3 CLJ 146 CA ***(refd)***
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1976] 1 LNS 19 FC ***(refd)***
De Silva v. PP [1964]1 LNS 32 HC ***(refd)***
Director of Public Prosecutions v. Hester [1973] AC 296 ***(refd)***
Farose Tamure Mohamad Khan v. PP & Other Appeals [2016] 9 CLJ 769 FC ***(refd)***
Goh Chong Ying v. PP [1989] 1 LNS 20 HC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Khoon Chye Hin v. PP [1961] 1 LNS 41 HC ***(refd)***
Mahboob Shah v. Emperor AIR 1945 PC 118 ***(refd)***
Manikumar Sinnapan & Ors v. PP [2017] 3 CLJ 505 FC ***(refd)***
Md Usaf v. R A 1929 N 215 ***(refd)***
Megat Halim Megat Omar v. PP [2009] 1 CLJ 154 CA ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No. 2) [1976] 1 LNS 184 ***(refd)***
PP v. Lim Kiang Chai [2016] 4 CLJ 173 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Munusamy [1980] 1 LNS 63 FC ***(refd)***
PP v. Sarjeet Singh Halban Singh & Anor [1994] 3 CLJ 95 HC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
R v. Hills [1988] 86 Cr App R 26 ***(refd)***
R v. Maganlal, 14 B 115 ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***
Samar Mansor v. Mustafa Kamarul Ariffin [1974] 1 LNS 147 FC ***(refd)***
Ugar v. State of Bihar AIR 1965 SC 277 ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Woolmington v. DPP [1935] 1 AC 462 ***(refd)***
Yap Ee Kong & Anor v. PP [1980] 1 LNS 117 FC ***(refd)***

Legislation referred to:
Child Act 2001, s. 97(2)(b)
Criminal Procedure Code, ss. 180(4), 182A
Evidence Act 1950, s. 133
Penal Code, ss. 34, 300(a)

The Indian Penal Code [India], s. 34

Other source(s) referred to:
Sarkar on Evidence, 14th edn, p 1924
Underhill's Treaties On The Law Of Criminal Evidence, 5th edn, vol 1, p 34

For the 1st appellant - Saha Deva Arunasalam; M/s Saha & Assocs
For the 2nd appellant - Surjan Singh Sidhu; M/s Surjan Singh Sidhu & Co
For the 3rd appellant - K Viknesvaran; M/s Viknes Ratna & Co
For the prosecution - Nahra Dollah; DPP

[Editor's note: For the Court of Appeal judgment, please see Puganeswaran Ganesan lwn. PP & Rayuan Yang Lain [2018] 1 LNS 1768 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli FCJ:

The Background Facts

[1] In the High Court at Shah Alam, the appellants were jointly tried for the murder of one Ganeshan a/l Muniandy and the charge against them was as follows:

> Bahawa kamu bersama-sama pada jam lebih kurang 0247 pagi 16 Februari 2012 di alamat No. 3A16, Blok A, Flat Petaling Utama, di dalam Daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, dalam mencapai niat bersama kamu bertiga, telah melakukan bunuh dengan menyebabkan kematian terhadap Ganeshan a/l Muniandy (No. K/P: 8111301-14-5521) suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dibaca bersama Seksyen 34 Kanun yang sama.

[2] They claimed trial to the charge at the conclusion of which they were found guilty as charged. The first and second appellants were sentenced to death whilst the third appellant was ordered to be detained at the pleasure of DYMM Sultan of Selangor pursuant to s. 97(2)(b) of the Child Act 2001 (Act 611) as he was under-aged at the time of the offence. Their appeals to the Court of Appeal were dismissed, hence the present appeals before us.

[3] The primary facts as disclosed by the evidence and which both the High Court and the Court of Appeal accepted as credible and accurate are as follows. The deceased, Ganeshan a/l Muniandy was the husband of the

second appellant. They had been married for nine years and had a daughter aged five years. The deceased worked as a lorry driver whilst the second appellant worked full time as a housewife. They lived next door to the first appellant.

[4] The second appellant knew the third appellant through the first appellant and it was the third appellant who introduced them to the three prosecution witnesses, namely Geethavan a/l Ravi (SP3), Viknesshen a/l Yogarajoo (SP4) and Darshan a/l Kanagaraju (SP5) who, like the third appellant were under-aged, being only 15-16 years old at the material time. According to SP3, he was told by the third appellant that the first and second appellants were lovers.

[5] These three witnesses were the lynchpin of the prosecution case. They admitted their involvement in the murder of the deceased, along with the third appellant. Thus the prosecution was relying on direct evidence, *albeit* that of accomplices to prove its case against the appellants rather than on circumstantial evidence. As such, it was a matter of either to believe or to disbelieve their evidence by the trial judge who had the audio-visual advantage of seeing and hearing them giving evidence, subject of course to the rule on acceptance of accomplice evidence.

[6] In *PP v. Sarjeet Singh Halban Singh & Anor* [1994] 3 CLJ 95; [1994] 2 MLJ 290 it was held *inter alia* that the credibility of an accomplice must be individually judged just as any other witness, applying the same considerations but with the added ingredient of him being an accomplice and that the court must take stock of the situation and consider who and what the accomplice is, his demeanour, bearing, the manner, quality and substance of his evidence in itself and in relation to all the circumstances of the case.

[7] The evidence of SP3, SP4 and SP5 was that in the evening of 15 February 2012, ie, the day before the murder, they went to the third appellant's house at the invitation of the third appellant. They were then brought by the third appellant to the first appellant's house. There, the third appellant gave SP3 some money to buy alcohol. SP3 bought vodka and thereafter he together with SP4 and SP5 returned to the third appellant's house. They chatted and drank vodka that evening but were not drunk.

[8] At 9pm they were again brought to the first appellant's house by the third appellant. The second appellant was present on this occasion. It was at this meeting that the first appellant told SP3, SP4 and SP5 that the deceased was a bad husband as he had asked his wife the second appellant to do some dirty job for other men ("ajak lelaki lain buat kerja kotor"). For that reason, the first appellant wanted the deceased to be killed and promised SP3, SP4 and SP5 RM5,000 each to do the job, which was to be paid using the deceased's EPF savings.

[9] The plan by the first appellant to murder the deceased was gruesomely simple with the direct involvement of the second appellant. The *modus operandi* was for SP3 to hold the deceased's legs, SP5 to cover the deceased's face with a pillow and the third appellant to finish the deceased off by stabbing him with a knife.

[10] As for the second appellant, her role was to signal to the first appellant that the deceased had returned home from work and had gone to sleep. She was to do this by making a missed call to the first appellant. She was then to open the front door of their house to allow SP3, SP4, SP5 and the third appellant to enter and to pass the pillow to SP5.

[11] At about 2am on 16 February 2012, the first appellant received a missed call from the second appellant. The first appellant then instructed the third appellant, SP3, SP4 and SP5 to proceed next door to carry out his nefarious plan. As pre-arranged, the second appellant opened the front door of the house and passed the pillow to SP5.

[12] But before they could take the next step, SP4 became scared and he ran out of the house. This was followed by SP3, SP5 and the third appellant and they returned to the first appellant's house. At the first appellant's house, the third appellant scolded SP3, SP4 and SP5 and questioned their manhood. He hit SP3's back with a knife, injuring him, and the first appellant slapped SP4. They threatened to kill SP3, SP4 and SP5 if they refused to do what they were told to do.

[13] After about an hour, SP3, SP4 and SP5 were again asked to carry out the original plan, but they told the first and third appellants that they were scared. On hearing this, the first appellant performed a "puja" prayer in front of the altar in his house. During the "puja" prayer, the first appellant rubbed the parang (exh. X9) with prayer ash. After the "puja" prayer, the first appellant handed the parang to SP4. The first appellant then told SP3, SP4 and SP5 not to worry as the parang had been blessed. It was an assurance by the first appellant that everything would go as planned.

[14] The deceased's fate was sealed when the second appellant made the second missed call at about 2.45am. The first appellant immediately instructed the third appellant, SP3, SP4 and SP5 to finish the job. The front door of the deceased's house was opened by the second appellant and she passed the pillow to SP5.

Failure To Cross-examine

[15] We pause here to note that this crucial part of the case for the prosecution, which directly and gravely implicated the second appellant in the murder of her husband, was not challenged at all in cross-examination. The evidence is therefore deemed to be admitted: see *Wong Swee Chin v. PP* [1980] 1 LNS 138.

[16] Evidence that is not challenged in cross-examination needs no corroboration, even where it comes from an accomplice. It must be taken as proved unless the evidence is so inherently incredible that no reasonable tribunal would accept it as true or that the evidence has been effectively rebutted by other evidence led by the prosecution.

[17] Yet the appellants are now contending that the evidence of SP3, SP4 and SP5 should not be believed, although they fall short of saying that the evidence is inherently incredible. The following exposition by Lord Halsbury in the House of Lords case of *Browne v. Dunn* (1893) 6 R 67 answers the point:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them as opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

[18] The same point was lucidly explained by Mukharji J in *AEG Carapiet v. AY Derderian* AIR 1961 Cal 359 in the following terms:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. **It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice**. It serves to prevent surprises at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is made comes to give evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or which that witness had any share. **If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety**. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated. (emphasis added)

[19] The principle applies to both civil and criminal cases. The duty to put the defence version of events to the prosecution witnesses was again emphasised in *Megat Halim Megat Omar v. PP* [2009] 1 CLJ 154 where Abdull Hamid Embong JCA (as he then was) delivering the judgment of the Court of Appeal said:

> Although in our criminal jurisprudence, there is no burden on an accused person to prove his innocence but merely for him to raise a reasonable doubt as to his guilt, it is trite that his defence should be put to the

> prosecution at an early stage during the prosecution case. Failure to do so may move the trial court to dismiss a particular line of defence as an afterthought, or a recent invention as happened in this case.

[20] This is not to say that mere failure by the defence to challenge any crucial part of the prosecution case must lead to a conviction, as the duty to prove the case beyond any reasonable doubt, subject to any exception to the rule, rests with the prosecution throughout and does not shift: see *Woolmington v. DPP* [1935] 1 AC 462; (1936) 25 Cr App R 72 where Viscount Sankey LC said:

> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to ... the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner ... the prosecution has not made out the case and the prisoner is entitled to an acquittal.

[21] It may be of interest to know briefly the facts of the case. Woolmington was a 21 year-old farm labourer. On 22 November 1934, three months into his marriage to Kathleen Woolmington, she left him and went to live with her mother. On 10 December 1934, he stole a double barrelled shotgun and cartridges from his employer, cycled to his mother in law's house and shot his wife, killing her. He was arrested and charged with willful murder.

[22] Woolmington claimed that he did not mean to kill her. He said he went over to try and win her back and threatened to kill himself, but accidently shot her in the heart. At the Bristol Assizes (old version of trial by jury), Swift J ruled that the case was so strong against Woolmington that the burden of proof was on him to show that the shooting was accidental. On 14 February 1935, he was convicted and sentenced to death.

[23] He appealed on the ground that the trial judge misdirected the jury. Avory J refused the appeal, relying on a passage from Foster's Crown law which stated that when a murder took place, then it was reasonable to assume that the prisoner was guilty unless he had evidence to prove otherwise. The issue was brought to the House of Lords to determine whether that was a correct statement. This was where Viscount Sankey LC made his 'golden thread' speech referred to in para. [19] above. Woolmington's conviction was quashed and he was acquitted.

[24] SP3's, SP4's and SP5's testimony were that after entering the deceased's house, they went straight to the deceased's bedroom. As pre-arranged, SP5 covered the deceased's face with the pillow given by the second appellant while SP3 held the deceased's legs. According to SP3, the deceased was lying on his back when he was holding his legs. At the same time, the third appellant stabbed the deceased with the knife that he was

carrying. According to SP5, he saw the third appellant stabbing the deceased twice. SP4, who was carrying the parang (exh. X9), only stood behind the third appellant.

[25] The stabbing woke the deceased up and he groaned in pain. The third appellant, SP3, SP4 and SP5 then ran away through the same door that they had entered earlier. SP4 was the first to run away and he incurred the wrath of the third appellant for releasing the deceased's legs too early.

[26] SP4 threw the parang on the floor in the living room of the deceased's house, which he positively identified at the trial through photo no. 19 of exh. P8. The deceased's DNA was found on the parang but no trace of human blood was found on it, either of the deceased or of anyone else. SP4 said he heard the second appellant screaming for help as he was running away from the scene.

[27] Despite being fatally injured, the deceased managed to get up and chased after his assailants but collapsed and died in the corridor in front of the first appellant's house. Photos no. 13 and 14 of exh. P8, which were taken by the police photographer (SP1) before the deceased's body was removed, confirmed that this was the exact spot where he collapsed and died, not far away from the bedroom where he was stabbed.

[28] Photos no. 28 and no. 33 of exh. P8 show splattered blood on the floor right next to the bed where the deceased was stabbed and blood was also found on the floor in the living room as shown in photos no. 19, 20, and 21 of exh. P8. The presence of blood in these locations confirms SP3's, SP4's and SP5's evidence that the stabbing took place in the deceased's bedroom and that the deceased went out of the room to chase after them after he was stabbed by the third appellant.

[29] The knife that was used by the third appellant to stab the deceased was never found. According to the investigating officer (SP15), the information that he received was that the knife was thrown into the Kelang river after the murder. He and the police scuba diver team tried to retrieve it from the river bed but was unsuccessful as the current was too strong.

Forensic Evidence

[30] The deceased's body was brought to the Universiti Hospital, Petaling Jaya on the same day that he was murdered and a post-mortem was conducted by Forensic Pathologist Dr Prashant Naresh Samberkar (SP2) at 10am. He found the following external injuries on the deceased's body:

(i) a 5.5 cms x 1.8 cms penetrating stab wound over the right 8th intercostal space, causing a soft tissue haemorrhaging over the 7th x 8th ribs over the front of the rib cage, slicing the 8th rib costal cartilage and entering the abdominal cavity, causing entry and exit wound on the lower 1/3rd of right lobe of liver and further entering and exiting the body of the stomach;

(ii) a 04 cms x 02 cms incised wound on the outer surface of the left knee;

(iii) a 07 cms incised wound on the back of the left arm;

(iv) a 072.5 cms x 0.3 cms incised wound on the back of lower 1/3rd of left arm;

(v) a 05 cms x 1.5 cms penetrating stab wound on the left loin;

(vi) a 05 cms x 0.8 cms penetrating stab wound on the upper and inner 1/3rd of the right gluteal region.

[31] SP2 determined the cause of death to be due to "Haemorrhagic shock due to multiple penetrating stab wounds". According to him, the fatal injuries were injuries no. 1 and no. 5, which had caused massive loss of blood. Injury no. 1 was caused by a stab to the chest which penetrated the liver whilst injury no. 2 was caused by a stab to the left loin which damaged the kidney. Both injuries were inflicted using a sharp weapon 10-15 cm or more in length. This crucial part of the prosecution case was also not challenged in cross-examination and is therefore deemed to be admitted. In any event, there was no expert evidence to the contrary.

[32] Whoever inflicted these fatal injuries on such vital parts of the deceased's body with such dangerous weapon must have intended to cause his death, an act that falls within the definition of murder under s. 300(a) of the Penal Code. Given SP2's unchallenged and uncontradicted evidence that the deceased was stabbed to death, we do not consider the failure by the prosecution to recover and produce the murder weapon at the trial to have undermined the prosecution case in any way.

[33] It was also SP2's testimony that the injuries were *ante*-mortem, meaning to say they were inflicted when the deceased was still alive. SP2 confirmed that the deceased did not suffer from any disease which caused or contributed to his death. He further confirmed that the stomach of the deceased contained undigested food and alcohol.

Prima Facie Case

[34] On these primary facts, the learned trial judge found, rightly in our view, that a *prima facie* case had been established against the appellants. As they stood, the direct evidence of SP3, SP4 and SP5 which the learned trial judge accepted as the truth, and inferences to be drawn from the surrounding circumstances and probabilities of the case, would warrant the appellants' convictions if unrebutted or unexplained: see s. 180(4) of the Criminal Procedure Code ("the CPC") which provides as follows:

> (4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which **if unrebutted or unexplained would warrant a conviction**.
>
> (emphasis added)

[35] In finding SP3, SP4 and SP5 to be credible witnesses, the learned trial judge had reminded herself of the need to be cautious with their testimonies and of the need for corroboration. She did not therefore fall into the same error that the trial judge in *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155 fell into as can be seen from the following remarks by Suffian LP delivering the judgment of the former Federal Court:

> It is true that the Judge nowhere stated in explicit terms that he was aware of the danger of convicting on the uncorroborated evidence of an accomplice and that the corroboration required must be independent testimony which confirms in some material particular not only that the crime has been committed, but also that the accused committed it *The King v. Baskerville* [1916] 2 KB 658 and *Chiu Nang Hong v. Public Prosecutor* [1965] 1 MLJ 40.

The Defence Case

[36] When called upon to state their defence, the appellants chose to give sworn evidence. The first appellant's explanation was that at the time of the incident, he heard someone screaming and running at the corridor of his house. He then heard someone knocking on the door of his house and when he opened the door, it was the second appellant. At the same time, he saw the deceased collapsing in front of his house, soaked in blood.

[37] According to him, the third appellant also came over to his house. He said he and the third appellant just watched what was unfolding before their eyes, without doing anything. Earlier in examination in chief however, he had said that he was alone in the house from 2am to 4am on 16 February 2012. It was only after being told by his counsel to think carefully ("fikir betul-betul") that he quickly changed his story by saying that the third appellant was with him all along.

[38] A few minutes later, members of the public came and the first appellant said he asked the third appellant to go home. The police and the ambulance arrived about 20 minutes later. After the police had done their work, the first appellant cleaned the area where the deceased collapsed using a mop which he took from his house.

[39] The first appellant confirmed that he was arrested the next day. He claimed that while at the police station, he was assaulted by the police and asked to confess to the murder of the deceased or else his parents would be investigated and charged with the murder. The first appellant's defence, in short, was that he had nothing to do with the deceased's death as he was in his house watching DVD with the third appellant when the murder was committed next door.

[40] As for the second appellant, her explanation was that on 16 February 2012 at about 2.30am, she was in her house at No. 3A-16, Blok A, Petaling Utama Flat, Petaling Jaya Selangor with her five-year old daughter. She testified that when the deceased came home at about 2am, she opened the

door and unlocked the grille, and then returned to the sofa where she had been lying down earlier. She said the deceased looked unstable and she scolded him and he scolded her back.

[41] The deceased then asked her to prepare something for him to eat and went straight to his bedroom to change his clothes. When the deceased did not come out after five minutes, she said she went to check and saw that the deceased was already sleeping. She then switched off the lights and returned to the sofa in the living room and fell asleep.

[42] She said it was normal for her to wait in the living room every night for the deceased to come home. The reason she gave was that when she slept in the bedroom, she would not be able to hear the knock on the front door. When that happened, she would be late in opening the door and this would enrage the deceased and he would hit and kick her.

[43] The second appellant went on to testify that while she was sleeping, she was awakened by a loud commotion in the bedroom where the deceased was sleeping. When she got up, she saw three persons running out of the room and heading towards the main door. She said she did not know who opened the main door and grille. She assumed that the deceased had not locked them when he returned home from work.

[44] The second appellant further testified that when she saw the three persons running out of the house, she screamed and at the same time she saw the deceased coming out of the bedroom heading towards the front door. His body was full of blood. She said she followed the deceased to the corridor of the flat where she saw him collapsing. She screamed for help. Within minutes her neighbours came over, followed by the police and the ambulance.

[45] She said she was arrested at 9pm the following day after the burial of the deceased and after she was called to the police station. At the police station, she said she was assaulted by the police and forced to sign 10-11 pages of blank documents. In short, the second appellant's defence was that she had slept through the murder of her husband.

[46] Lastly, the defence of the third appellant. His explanation was that at all material times on 16 February 2012, he was at the first appellant's house. He said that at about 2am he was watching DVD with the first appellant and there was no one else with them in the house. He said he did not go out and neither did anyone enter the house throughout the time that he was in the first appellant's house. He said he remained in the first appellant's house until he saw the deceased's body in front of the house.

[47] According to the third appellant, what happened that early morning was that while he and the first appellant were watching DVD, suddenly he heard someone running in front of the house and when the first appellant opened the door, he saw someone whom he did not know collapsing in front

of the house and the person was still alive. He was then asked by the first appellant to go home, which he did. He said he did not tell anyone about the incident as he was scared.

[48] The third appellant further testified that on the morning of 16 February 2012, he had gone to the hospital for an appointment as he had fractured his left hand in a motorcycle accident. He said his left hand was cast in white plaster of paris. He said he was still in the hospital ward when he was arrested by the police two days after the incident. He said he was with his mother throughout his stay at the hospital. In short, the third appellant's defence was that he had nothing to do with the murder of the deceased as he was at the first appellant's house watching DVD with the first appellant.

No Legal Burden On The Appellants

[49] It is a cardinal principle of criminal law that the burden lies throughout on the prosecution to prove its case beyond any reasonable doubt. It is a heavy burden and is only half discharged by establishing a *prima facie* at the close of its case. The law is trite that an accused person has no duty to prove or to disprove anything unless he has a legal burden to discharge, such as the burden of rebutting a statutory presumption or to prove any of the general exceptions under the Penal Code, in which case his burden is discharged if he proves his case on the balance of probabilities (as opposed to proof beyond reasonable doubt): see *PP v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89 PC.

[50] Where however a *prima facie* case has been established against the accused and he chooses to remain silent when called upon to state his defence, the court must proceed to convict him: see *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. In the present case, the appellants had no burden to prove or to disprove anything in their defence. They were entitled to an acquittal if their explanation succeeded in raising a reasonable doubt in the mind of the trial judge as to their guilt.

Reasonable Doubt

[51] A "reasonable doubt" however does not mean just any doubt conjured up by the accused to create a difficulty in the trial judge's mind. The meaning of "reasonable doubt" has been explained by Lord Hewart CJ in *Re Padmore*'s 22 Cr App R 36 in the following terms in his direction to the jury:

> You will not, I am sure, allow yourselves to be bewildered or troubled by such a phrase. What it means is not some whimsical or fanciful doubt, which a person might conjure up for the purpose of creating a difficulty but such a doubt as would govern a man's course of action in some private affair or moment of his own.

[52] In *Underhill's Treaties On The Law Of Criminal Evidence* (5th edn, vol. 1 at p. 34), the following passage on "reasonable doubt" can be found:

> A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in their minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt.

[53] Perhaps the most oft-quoted definition of the expression "proof beyond reasonable doubt" is that given by Lord Denning in *Miller v. Minister of Pensions* [1947] 2 All ER 372 where at p. 373 the learned judge said:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. **Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt**. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt.
>
> (emphasis added)

Court's Duty At The Conclusion Of Trial

[54] The procedure to be followed by the court at the conclusion of the trial is prescribed by s. 182A of the CPC which provides as follows:

> 182A. (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[55] Having directed her mind to this provision, the learned trial judge then proceeded to carefully consider the defence case against and in the light of the prosecution evidence. Having done so, she found that the appellants' explanation failed to raise any reasonable doubt in her mind as to the truth of the prosecution case and that the prosecution had proved its case beyond any reasonable doubt. She was satisfied that the third appellant's act of stabbing the deceased to death was done in furtherance of the common intention of all three appellants to kill the deceased. In common parlance, she was sure of their complicity in the crime.

[56] Far from casting a reasonable doubt in the case for the prosecution, the second appellant's evidence in fact strengthened the prosecution case by confirming in material particulars SP3's, SP4's and SP5's evidence. In particular, she confirmed their evidence that the door to the deceased's house was left open before and after the murder and that she screamed for help as the deceased came out of his bedroom to chase after his assailants.

[57] The second appellant's claim that she saw only three persons running out of the deceased's bedroom after the murder has to be an afterthought and an attempt to save the third appellant from punishment as it was never put to SP3, SP4 and SP5 in cross-examination, who testified that all four of them, including the third appellant, ran out of the room after the murder.

Accomplice Evidence

[58] This was the main plank of the appellants' argument before us, that the testimonies of SP3, SP4 and SP5 ought to have been rejected by the trial judge as they were accomplices and there was no independent corroboration of their evidence. We were referred to the following authorities for support:

(i) *Goh Chong Ying v. PP* [1989] 1 LNS 20; [1989] 2 MLJ 334, a decision of the Singapore High Court case where Chua J held as follows:

> The trial judge relied entirely on the testimony of the two accomplices. He had wrongly admitted and relied on the evidence of the appellant's allegedly past criminal act. He did not pay proper and careful consideration to the evidence of the accomplices. The many material inconsistencies, self contradictions and discrepancies were serious and should cast grave doubts on the credibility of Pannir and Tan Yong Kwang. The trial judge failed to realise that one accomplice cannot corroborate each other.

(ii) *Director of Public Prosecutions v. Hester* [1973] AC 296 where Lord Diplock said:

> ... an analogy with the common law rule as to accomplices who are *particeps criminis* in the actual offence charged. The practice of giving the warning as to the desirability of confirmation from another source when more than one accomplice gave evidence implicating the accused seems to have originated in the opinion expressed by Littledale J. in his summing up in *Reg. v. Noakes* (1832) 5 C & P 326.
>
> There is a continuing logical basis for the practice, for the reason which makes one accomplice a suspect witness, *viz.*, the natural temptation to exculpate himself or to minimise the part which he played in a common crime, applies also to any other accomplice in the same crime, and there is every reason for them to concert together to tell the same false story.

(iii) *Chong Chee Liong v. PP* [2008] 3 CLJ 146; [2008] 2 MLJ 797, a decision of the Court of Appeal where Hasan Lah JCA (as he then was) quoted a passage in *Sarkar on Evidence* (14th edn) at p. 1924 which states that the principal reasons for holding accomplice evidence to be untrustworthy, are: (1) because an accomplice is likely to swear falsely in order to shift the guilt from himself; (2) because an accomplice being a participator in crime, and consequently an immoral person, is likely to disregard the sanction of an oath; (3) because an accomplice gives his evidence under the promise of a pardon, or in the expectation of an implied pardon; if he discloses all he knows against those whom he acted criminally, and this hope would lead him to favour the prosecution (per Scott J in *R v. Maganlal*, 14 B 115; *Md Usaf v. R A* 1929 N 215).

[59] We must say with respect that the authorities relied upon by the appellants are authorities on general principles of law on how the court is to treat accomplice evidence. They do not support the appellants' contention that the learned trial judge was wrong in accepting SP3, SP4 and SP5 as credible witnesses. As we mentioned, she had complied with the rule on accomplice evidence by reminding herself of the need to be cautious with their evidence and of the need for corroboration.

[60] For obvious reasons, the decisions in those cases must be confined to their own peculiar facts and circumstances. In the first of the three cited cases, apparently the trial judge had considered the evidence of another accomplice as corroboration, which was a clear misdirection in law warranting appellate intervention.

[61] The law on accomplice evidence is well settled. An accused person may be convicted even on the uncorroborated evidence of an accomplice and it is totally irrelevant that the accomplice is not charged together with the others who committed the same crime, a point that the appellants argued must be decided against the prosecution for not charging SP3, SP4 and SP5 with the same offence that the three appellants were charged with. This is made explicitly clear by s. 133 of the Evidence Act 1950, which reads:

> 133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[62] In *PP v. Lim Kiang Chai* [2016] 4 CLJ 173 this is what this court had to say on accomplice evidence:

> [75] Despite the parties' non-submission before the High Court and before us as to whether PW26 was an accomplice, we hold the view that PW26 was an accomplice. It is trite that an accused person may be convicted solely on the evidence of an accomplice provided that he is found to be a credible witness and that the court had warned itself on the danger of convicting the accused on an uncorroborated evidence of

an accomplice: see s. 133 of the Evidence Act, *Lee Choh Pet & Ors v. PP (No. 2)* [1972] 1 LNS 65; [1972] 1 MLJ 187, *Thavanathan Balasubramaniam v. PP* [1997] 3 CLJ 150; [1997] 2 MLJ 401.

[63] In *Farose Tamure Mohamad Khan v. PP & Other Appeals* [2016] 9 CLJ 769; [2016] 6 MLJ 277, this court made the following observations at para. 108 of the judgment:

> [108] As a starting point, s 133 of the Evidence Act 1950 provides that an accomplice is a competent witness against an accused person, and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Illustration (b) of s 114 of the same Act provides that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In respect of the nature and extent of the corroboration, Raja Azlan Shah CJM (as His Majesty then was) in *Yap Ee Kong & Anor v. Public Prosecutor* [1981] 1 MLJ 144 (at p 146) formulated the rules as follows:
>
> (1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;
>
> (2) The independent evidence must not only make it safe to believe that a crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particulars the testimony of the accomplice; and
>
> (3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.

[64] The case of *Yap Ee Kong & Anor v. PP* [1980] 1 LNS 117; [1981] 1 MLJ 144 that this court referred to in the above case was a re-affirmation of the rule laid down by Sharma J in *Attan Abdul Gani v. PP* [1969] 1 LNS 12; [1970] 2 MLJ 143 where the learned judge had said:

> There is no magic in the use of the word "corroboration". The existence of corroboration is not dependent upon the use of that word. The main thing to look for is whether it exists. In some cases it may require some effort, examination and analysis of the evidence to find it, while in others, as in this case, it may appear undisguised and manifest on the face of the record itself.

[65] After referring to various authorities, the learned judge went on to summarise the law on corroboration as follows:

> The law as to corroboration as enunciated by the various authorities may be summarised thus:
>
> > It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the

circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear:

(1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

(3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

(4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

(5) Corroboration must be in material particulars but it is not necessary that the whole prosecution story or all material particulars should be corroborated.

(6) Corroborative evidence required for accepting the testimony of an accomplice need not by itself conclusively establish the guilt of the accused. It is sufficient if it is a piece of circumstantial evidence which tends to connect the accused with the crime with which he is charged.

(7) Though a trap-witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely on his evidence without corroboration. His evidence is not a tainted one; it would only make a difference in the degree of corroboration required rather than the necessity for it.

(8) Corroboration need not be by direct evidence. It may be by circumstantial evidence in which case the rule relating to proof from circumstantial evidence would apply and the circumstances must be consistent with the innocence of the accused against whom the circumstance is offered as evidence.

(9) There must be corroboration in one or more material particulars but that does not mean in every particular or detail. Corroboration, as the grammatical meaning of the word implies,

means only support, or in other words, an assurance of the truth which is lent to the evidence of the accomplice or the complainant by other evidence. It does not mean that the whole evidence given by the accomplice (or complainant) must be repeated wholly or in parts by witnesses other than the accomplice (or the complainant).

(10) The minimum corroboration which the law ordinarily requires of the evidence of an accomplice is evidence of at least one material fact pointing to the guilt of the accused person. The weight of such corroborative evidence which is necessary depends on the particular facts and circumstances of the case.

[66] The object of corroboration no doubt is to satisfy the court that the witnesses are telling the truth and that it is reasonably safe to act on their evidence. It is not necessary that the corroboration should be of the actual commission of the crime, for then there would be independent evidence of the commission of the offence. It would be enough corroboration if there is independent evidence of relevant circumstances connecting the accused with the crime: see *PP v. Datuk Hj Harun Hj Idris (No 2)* [1976] 1 LNS 184; [1977] 1 MLJ 15 per Raja Azlan Shah J (as he then was).

[67] If we were to accede to the appellants' argument that SP3, SP4 and SP5 should have been charged together with the appellants for the murder of the deceased instead of being made prosecution witnesses, it will render illusory the Public Prosecutor's constitutional power to decide who among the perpetrators of the crime should be charged and who to be made prosecution witnesses. The implication is to render s. 133 of the Evidence Act completely redundant and denuded of all meaning, which goes against an established canon of statutory interpretation that the Legislature does not legislate in vain. We are therefore constrained to reject the appellants' argument.

[68] In *Yap Ee Kong*, the conviction of the second appellant was set aside because the evidence against him was based on the bare statement of the accomplice and it was a serious misdirection on the part of the appellate judge to consider the previous statement of an accomplice as good corroboration. As regards the first appellant, there was hardly any evidence against him in the first place and the question of corroboration did not arise. It was therefore a case where there was no corroboration of the accomplice's evidence, unlike the case before us.

[69] In the case before us, there was in fact corroboration of the evidence of SP3, SP4 and SP5 but despite that the learned trial judge went a step further by reminding herself of the need to be cautious with their evidence, which would have been necessary had there been no corroboration of their evidence and the court was relying entirely on the uncorroborated evidence of the accomplices: see the Privy Council case of *Chiu Nang Hong v. PP* [1964] 1 LNS 24; [1965] 1 MLJ 40.

[70] *Chiu Nang Hong*, we need to mention, was a rape case where there was no evidence coming from a source independent of the complainant which tended to show that she did not consent of her own free will. The complainant had testified at the trial that she had been threatened into submission with violence by the appellant.

[71] The question is whether there is corroboration of at least one material fact of the evidence of SP3, SP4 and SP5 that points to the guilt of the appellants, bearing in mind the prosecution was relying on common intention under s. 34 of the Penal Code to prove its case against the second and third appellants who did not partake in the actual act of murdering the deceased.

[72] Having gone through the evidence carefully, we find that the testimonies of the three accomplices were corroborated not just by one material fact that points to the guilt of the appellants but by at least eight strands of neutral evidence, thus making it safe for the learned trial judge to have relied on their evidence.

[73] The independent evidence that affords corroboration to the evidence of SP3, SP4 and SP5 are the following:

(i) Two fatal stab wounds were inflicted on the body of the deceased as found by the forensic pathologist (SP2), one in the chest and the other in the left loin. This independent and unchallenged forensic evidence corroborates SP5's evidence that the deceased was stabbed twice by the third appellant. In any event, it was never put to SP3, SP4 or SP5 in cross-examination that the third appellant was not present at the scene of crime;

(ii) There was blood splattered on the floor right next to the deceased's bed. This corroborates the accomplices' evidence that he was stabbed in his bedroom while he was sleeping;

(iii) There was blood on the floor in the living room. This corroborates the accomplices' evidence that the deceased came out of the room after being stabbed;

(iv) The deceased's body was found in the corridor in front of the first appellant's house, which was located just next to the deceased's house. This corroborates the accomplices' testimony that the deceased chased after them before he collapsed and died;

(v) The parang (exh. X9) was found on the floor in the living room of the deceased's house. This corroborates SP4's evidence that he threw the parang on the floor in the living room as he fled the scene after the murder;

(vi) The existence of the altar in the first appellant's house as shown in photo no. 17 of exh. P7 corroborates the accomplices' evidence that the first appellant performed a "puja" prayer to bless the parang (exh. X9) after the first attempt to carry out the murder plan was aborted due to SP4's change of mind;

(vii) No trace of blood, let alone the blood of the deceased was found on the parang (exh. X9) as confirmed by scientific officer P Revathi a/p Perumal (SP6). This corroborates SP4's evidence that he did not use the parang to slash the deceased and negates the appellants' suggestion in cross-examination that he had used the parang to slash the deceased;

(viii) The assailants entered the deceased's house twice and with ease at such unearthly hours. This is strong circumstantial evidence to corroborate the accomplices' testimony that the second appellant had, as pre-arranged, opened the main door to let them in to carry out the murder. As we mentioned, this evidence was not challenged at all in cross-examination and is therefore deemed to be admitted.

[74] We cannot therefore accede to the appellants' contention that there was no corroboration of the accomplices' evidence to link them with the murder of the deceased. On the evidence before her, the learned trial judge was right in our view to accept SP3, SP4 and SP5 as witnesses of truth on all material particulars, whose evidence taken together and in its entirety shows that the murder of the deceased by the third appellant was in furtherance of the common intention of all three appellants.

[75] That circumstantial evidence may provide corroboration is established by *R v. Hills* [1988] 86 Cr App R 26, where the court held as follows:

> Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence, each innocuous on its own, which together tend to show that the defendant committed the crime. For example, in a rape case, where the defendant denies he ever had sexual intercourse with the complainant, it may be possible to prove (1) by medical evidence that she had had sexual intercourse within an hour or so prior to the medical examination, (2) by other independent evidence that the defendant and no other man had been with her during that time, (3) that her underclothing was torn and that she had injuries to her private parts. None of these items of evidence on their own would be sufficient to provide the necessary corroboration, but the judge would be entitled to direct the jury that if they were satisfied so as to feel sure that each of those three items had been proved, the combined effect of the three items would be capable of corroborating the girl's evidence.

[76] As against the finding of the learned trial judge that SP3, SP4 and SP5 were credible witnesses, learned counsel for the appellants sought to discredit their evidence by saying that their evidence was inconsistent, unclear, imprecise and "riddled with contradictions".

[77] Learned counsel for the third appellant went so far as to submit that SP3, SP4 and SP5 had given evidence on behalf of the prosecution "In Exchange For Want Of Prosecution". *Gooi Loo Seng v. PP* [1993] 3 CLJ 1; [1993] 2 MLJ 137 was cited in support where Edgar Joseph Jr SCJ criticised the trial judge for adopting the "Nelsonian" approach of accepting at face value the evidence of the accused's girlfriend when he should have recognised that she might have every possible motive to suppress the truth and to lie, bearing in mind she was an obvious suspect.

[78] With due respect, we find the allegation to be without basis. An allegation of this nature should not be made based purely on a hunch or conjecture. In the first place, it was not even put to SP3, SP4 and SP5 that they had been promised with immunity from prosecution in return for implicating the appellants in the murder of the deceased.

[79] By failing to put the allegation to SP3, SP4 and SP5 in cross-examination, these witnesses had been deprived of the chance to defend their positions either by confirming the allegation or denying it while they were still in the witness box and while still under oath. One must not assume that their answers to the question, if put, would be unfavourable to the defence and favourable to the prosecution and therefore futile to ask. In any event, it was entirely for the Public Prosecutor to decide whom to call as witnesses to ensure that justice is done. The allegation is therefore wholly unjustified and has no bearing on the correctness of the decision of the High Court to convict the appellants.

Discrepancies In Evidence

[80] Learned counsel for the second appellant submitted that in so far as it implicated the second appellant, the evidence of SP3, SP4 and SP5 should not be believed in view of the material discrepancies in and between their evidence, as follows:

(i) In examination-in-chief, SP4 said that when he, SP3 and SP5 went up to the first appellant's house and started drinking alcohol, the second appellant and her daughter were in the first appellant's house, but in cross-examination, SP4 said the second appellant and her daughter were not present during the discussion in the first appellant's prayer room;

(ii) In re-examination, SP4 testified that he went to the first appellant's house in the evening, he could not remember if the second appellant was in the first appellant's house, but changed his story later when he said he saw the second appellant in the first appellant's house when he went to his house for the second time;

(iii) SP5 in examination-in-chief testified that he went to the first appellant's house for the first time with SP4 and the third appellant on 15 February 2012 after 5pm and that on arrival, he saw the first appellant's mother and the second appellant and her daughter were also there, but in

cross-examination, SP5 said he only met the second appellant when he came to the first appellant's house for the first time after 5pm and he did not meet the second appellant nor her daughter when he went up to the first appellant's house for the second time after 9pm;

(iv) SP5 testified that the second appellant not present during the discussion in the first appellant's prayer room, but later said the second appellant was in the first appellant's house from 9pm to 9.30pm and left when he came to the hall after drinking in the kitchen;

(v) SP3 and SP4 testified that it was the third appellant who gave money to SP3 to buy alcohol in the evening of 15 February 2012, but SP5 testified that it was the second appellant who gave RM50 to the first appellant, who then passed it to the third appellant before handing it to SP3;

(vi) SP3 testified that they left the second appellant's house on their first entry because the deceased had not slept yet, but SP4 and SP5 testified that they became afraid and returned to the first appellant's house.

[81] It was submitted that the above discrepancies in SP3's, SP4's and SP5's evidence show that they did not see the second appellant in the first appellant's house as claimed by SP3 and that they only saw her in front of her own house. It also shows, according to counsel, that the first and third appellants did not call anyone else into the prayer room, let alone the second appellant who was not in the first appellant's house at that point of time. In short, the contention was that the second appellant was never in the first appellant's house at any time prior to the murder of the deceased.

[82] The proper approach to deal with discrepancies in evidence is well settled by case law. In *Khoon Chye Hin v. PP* [1961] 1 LNS 41; [1961] MLJ 105b it was held that even where a witness demonstrably lies, it would be to go too far to say that his evidence must be rejected entirely. The proper way to deal with the evidence of such witness is to treat it with suspicion and caution. In considering them, what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy: see *De Silva v. PP* [1964] 1 LNS 32; [1964] MLJ 81.

[83] In *Ugar v. State of Bihar* AIR 1965 SC 277 the Supreme Court of India pointed out that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. Raja Azlan Shah FJ (as he then was) spoke in similar vein when he said in *PP v. Datuk Hj Harun Hj Idris (No. 2)* [1976] 1 LNS 184; [1977] 1 MLJ 15 at p. 19:

> In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing

> that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[84] In the case before us, it was not suggested that SP3, SP4 and SP5 had demonstrably lied in all aspects of their evidence that implicated the second appellant. We have taken note of the alleged discrepancies in the evidence of SP3, SP4 and SP5 as pointed out by learned counsel for the second appellant, but we do not find the discrepancies, if at all they can be described as discrepancies, to be so material as to vitiate the finding of guilt against the second appellant. The court must not concern itself with trivialities for to do so will divert attention away from the real issues before the court.

[85] At the risk of repetition, we need to emphasise that the second appellant had played a key role in the murder of her husband by opening the front door of the house to allow SP3, SP4 and SP5 to enter the house and to pass the pillow to SP5, which evidence she did not challenge at all in cross-examination.

Common Intention

[86] We now come to the issue of common intention. This criminal law concept came to life in Malaysia with the enactment of s. 34 of the Penal Code. The section provides as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[87] In *Mahboob Shah v. Emperor* AIR 1945 PC 118 the Privy Council explained in erudite terms the purport of s. 34 of the Indian Penal Code which is in *pari materia* with s. 34 of our Penal Code:

> Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intention of all" nor does it say "an intention common to all". Under the section, the essence of that liability is to be found in the existence of a common intention animating the Respondent leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the Respondent persons in the furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.

[88] In the earlier case of *Barendra Kumar Ghose v. Emperor* AIR 1925 PC 1, the Privy Council had said this on s. 34 of the Indian Penal Code:

> Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it. In other words, "a criminal act" means that unity of criminal behavior, which results in something for which an individual would be punishable if it were done by himself alone, that is a criminal offence.

[89] In *Ferose bin Tamure Mohamad Khan*, this court in dealing with s. 34 of the Penal Code referred to *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466; [2005] 4 MLJ 37 and *Manikumar Sinnapan & Ors v. PP* [2017] 3 CLJ 505; [2015] MLJU 1956; [2016] 2 MLRA 1 for the proposition that physical presence is not necessary to constitute participation in every case. It is sufficient for the accused to have done an act with some nexus to the offence.

[90] This answers the first appellant's argument that he could not be held liable for the murder of the deceased as he was not present at the scene of crime and did not take part in the stabbing of the deceased. By finding SP3, SP4 and SP5 to be truthful witnesses, clearly the learned trial judge had accepted as a fact that the first appellant was the mastermind behind the murder of the deceased although he was not physically present when the deceased was stabbed to death by the third appellant.

Concurrent Findings Of Fact

[91] Lastly but by no means the least important, the High Court and the Court of Appeal had made concurrent findings of fact, in particular a finding that the murder was committed in furtherance of the common intention of all three appellants. We do not think, in the circumstances, it is right for us to substitute those findings of fact with findings of our own. In *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737; [2004] 3 MLJ 405 this court *inter alia* noted as follows:

> [231] It is settled law that very rarely does a higher appellate court interfere with concurrent findings of fact by the courts below. Such view was expressed by the Privy Council in the case of *Satter Buxoo & Another v. The Queen* [1988] 1 WLR 820 PC, an appeal from Mauritius, where it is said at p. 824:
>
> > In the present case, however, it is plain that the circumstances of the appeal take it far outside any possible application of the principles in question. No point of law is involved. The only issue before the Intermediate Court and the Supreme Court was whether on the evidence led the defendants had been identified as being among the persons who carried out the serious assault

> which was undoubtedly perpetrated on the victim Fockeena. The Intermediate Court found that they had been and the finding was upheld by the Supreme Court. The Board could never consider it right to interfere with a concurrent finding of fact of that nature.

[232] And nearer home, that seems to be also the approach of this court as expressed in the recent case of *Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn & Ors* [2003] 3 MLJ 257 at p 273 where Abdul Malek Ahmad FCJ (as he then was) said:

> In our view, looking at the above cited passages from the judgment of the Court of Appeal and having regard to the fact that the issue that was decided by the Court of Appeal and the High Court was clearly one of fact, there is obviously no merit in the contention of the appellants as found in the grounds of appeal that the Court of Appeal erred in law in deciding as they did. Even assuming for a moment that the Court of Appeal erred in the application of the principles of law to the particular set of facts in the instant appeal, there is no room for this court to reverse the concurrent finding of fact made by the High Court and the Court of Appeal that the appellants were the guilty party in breach of the agreements since it is trite that the appellate court is not prepared to interfere with the concurrent finding of facts made by the court below as held by this court in *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 3 MLJ 517 at p 523.

[92] In *PP v. Munusamy* [1980] 1 LNS 63, the former Federal Court made it clear that:

> Where there have been concurrent findings of fact in the lower courts it should not be made the practice in the appeal court to review these concurrent findings of fact unless it is shown that there was no evidence to support the inferences drawn in the lower courts.

[93] It has not been shown that the concurrent findings of fact by the courts below are unsupported by the evidence, direct or circumstantial. Of crucial importance to note in this regard is that the concurrent findings involve the question of the credibility of the witnesses, namely SP3, SP4 and SP5. The Privy Council said in *Antonio Dias Caldeira v. Frederick Augustus Gray* [1934] 1 LNS 5 that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. See also *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; [1978] 2 MLJ 41b PC; *Samar Mansor v. Mustafa Kamarul Arifin* [1974] 1 LNS 147; [1974] 2 MLJ 71.

[94] In *Samar Mansor*, Raja Azlan Shah FCJ (as he then was) raised the question whether an appellate court should substitute its own views of the facts for that of the trial judge. He went on to say:

> For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal is by way of rehearing does not alter the situation. A rehearing is not however a retrial of the issues. The question is not whether an appellate court can substitute its views of the facts which of course it is empowered to do so, but whether it should do so. However such an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of facts unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the facts as found by the trial judge.

[95] For all the reasons aforesaid, we are satisfied that the Court of Appeal was right in affirming the decision of the High Court to find each of the appellants guilty of the offence charged. There had been sufficient judicial appreciation of the evidence by the learned trial judge and she had not misdirected herself either on the facts or on the law.

[96] The question of miscarriage of justice does not arise at all. In the circumstances, the appeals are dismissed. The decision of the Court of Appeal is affirmed.